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MEMORANDUM FOR TAXPAYER ADVOCATE SERVICE EMPLOYEES

FROM: Nina E. Olson /s/
National Taxpayer Advocate

SUBJECT: Interim Guidance on Recommending the Non-filing of
Notices of Federal Tax Lien in Certain Situations

This memorandum is part of a series that consolidates and clarifies current guidance in different Internal Revenue Manual (IRM) provisions and TAS training materials.¹ The purpose of this memorandum is to help Case Advocates and Local Taxpayer Advocates think through, in the context of the existing guidance, how they should advocate on behalf of taxpayers with respect to the filing of a Notice of Federal Tax Lien (NFTL) in cases involving installment agreements (IAs), Currently Not Collectible (CNC) status, or offers in compromise (OICs). There are certain situations in which the IRM requires automatic NFTL filing without considering individual taxpayer facts and circumstances and without managerial review.² In these situations, TAS employees need to investigate the case and apply the factors described in this memorandum to determine whether

¹ See, e.g., TAS, *Interim Guidance on Handling Collection Cases where Economic Hardship is Present but the Taxpayer has not Filed all Required Returns*, Control No. TAS-13.1-0110-001 (Feb. 28, 2010).

² For example, when the account is placed in CNC status, the IRM requires NFTL filing for any unpaid balance of \$5,000 or more, or if the IRS is unable to locate or contact the taxpayer, or the taxpayer is experiencing an economic hardship. IRM 5.12.2.4.1(1) (Oct. 30, 2009); IRM 5.19.4.5.2 (Apr. 26, 2006). The IRM requires the filing of an NFTL for non-streamlined IA accounts of more than \$5,000. IRM 5.19.1.5.5(19) (Dec. 4, 2009). Similarly, for example, an NFTL would normally be filed with OICs on unpaid balances of \$5,000 or more and the offer is being rejected or accepted with deferred payment terms. IRM 5.8.4.9 (Sept. 23, 2008).

the filing of an NFTL is appropriate. TAS employees should advocate for the non-filing of an NFTL when it is appropriate based on the taxpayer's facts and circumstances. TAS employees **do not** make the actual lien determination.

Background

Section 3421 of the IRS Restructuring and Reform Act of 1998 (RRA98) provides that, where appropriate, a supervisor review the proposed lien filing, considering the amount due and the value of the taxpayer's assets.³

In addition, Internal Revenue Code (IRC) § 6323(j)(1) provides the IRS a **discretionary** mechanism for withdrawing the NFTL when one of the following criteria is met:

- (A) The IRS filed the NFTL prematurely or otherwise not in accordance with procedures;
- (B) The taxpayer entered into an installment agreement to satisfy the liability (unless the IA provides otherwise);
- (C) The withdrawal would facilitate collection; or
- (D) The withdrawal is in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.⁴

In these situations, Case Advocates should advocate for the non-filing of a lien by arguing that the IRS should not file an NFTL because it would meet the criteria for withdrawal once filed.

When is a Lien Determination required?

IRM 5.19.1.5.5 describes the four (4) types of installment agreements that TAS employees have the delegated authority to accept: (1) streamlined (up to \$25,000), (2) non-streamlined (up to \$100,000), (3) guaranteed (up to \$10,000), and (4) in-business trust fund express (up to \$10,000). An NFTL determination is not required for installment agreement types (1), (3), and (4), but a lien determination is required for non-streamlined installment agreements (NSIAs). A lien determination is also required when placing an account into CNC status per IRM 5.12.2.4.1(1) if the balance owed is over \$5,000. Similarly, IRM 5.8.4.9 requires a lien determination in OIC cases where the unpaid balance of assessment is \$5,000 or more and the offer is being rejected or accepted with deferred payment terms.

Determining when to advocate for the non-filing of an NFTL

In situations where the taxpayer's individual facts and circumstances meet the criteria in IRM 5.12.2.4.2(1)-(8) for not filing or deferring an NFTL, or one of the

³ RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

⁴ IRC § 6323(j); Treas. Reg. § 301.6323(j)-1.

IRC § 6323(j)(1) requirements for an NFTL withdrawal, Case Advocates should advocate against the filing of an NFTL.⁵

When making the decision to request that the operating division refrain from filing an NFTL, you must carefully evaluate all of the facts and circumstances including the following:

- Compliance History. Has the taxpayer had prior balances due? If so, how recently? Would the NFTL filing jeopardize the taxpayer's ability to comply with the tax laws in the future? The fact that a taxpayer has never had a delinquent tax account before or has not had a delinquent account in recent years should weigh significantly in favor of refraining from filing an NFTL.
- Reasons for noncompliance. Is the taxpayer's noncompliance attributable to a one-time unusual or catastrophic event, such as a heart attack, hurricane, or a loss of job? Are there extenuating circumstances that may contribute to the noncompliance? The following situations are examples of such extenuating circumstances: after a stroke, the taxpayer fell behind in estimated tax payments, or after the loss of a job, the taxpayer incurred a ten percent penalty for early withdrawal from an IRA. In such situations, where the taxpayer has been historically compliant except for a one-time catastrophic event, filing of an NFTL will harm the taxpayer's ability to repay his or her tax liability and remain compliant in the future.
- Hamper Collection. Will the filing of an NFTL hamper the collection of tax? If not filing the NFTL will significantly impair the IRS's ability to collect the tax, this factor should weigh in favor of filing an NFTL.
- Undue Harm to the Taxpayer that Reduces Collection Potential. Consider whether the filing of the NFTL will harm the taxpayer's financial viability, thus reducing collection potential, *i.e.*, the filing prevents the taxpayer from obtaining or retaining employment or obtaining the financing necessary for a business taxpayer to remain in business. If the filing of the NFTL unduly harms the taxpayer and reduces collection potential, this factor should weigh in favor of refraining from filing an NFTL.
- Payment before the Collection Statute Expiration Date (CSED). Will the proposed Installment Agreement fully pay the taxpayer's balances owed prior to the expiration of the CSED? If the taxpayer can pay in installments before the CSED, this factor will weigh in support of a determination not to file an NFTL.

⁵ Under IRM 5.12.2.4.2(8) a taxpayer may also submit a faxed request for non-filing of the NFTL if the revenue officer has contacted the taxpayer by phone or in person. Such a request may include the reasons why the taxpayer wishes the NFTL not to be filed, which the RO should note in the case history.

- Existence and Value of the Assets. Are there assets, including real and personal property, to which the NFTL can attach? Is the taxpayer likely to acquire assets in the future? If so, determine the net equity in the assets. Research IRS databases and available third-party information concerning the taxpayer's assets, income, and the value of the equity in the assets. Where appropriate, request and review taxpayer financial information, including Forms 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, or Forms 433-B, *Collection Information Statement for Businesses*. If you have access, search assets on Accurint, a web-based asset locator system. Seek ROTA assistance if necessary to assist you with equity determination. If the NFTL will not attach to property with significant value, or if the taxpayer needs the equity to cover an anticipated, necessary expense, this factor will weigh in favor of a determination to refrain from filing an NFTL.

In analyzing your case, consider all the factors and determine whether the NFTL filing is appropriate. Remember that this is not a complete list of factors, and that you should consider other relevant factors depending on the facts of your case.

Note: If at any time you need assistance in determining whether it is appropriate to request the non-filing of an NFTL or whether the taxpayer owns assets, please contact a ROTA to discuss the individual facts and circumstances of your case. ROTAs have access to Accurint.

Example 1

You have been assigned the case of Taxpayer A, who owes \$10,000 in income tax, penalty, and interest for 2008. The compliance history shows that Taxpayer A has been compliant in recent years and any past delinquencies were promptly resolved. A review of the taxpayer's Collection Information Statement (CIS) shows that he can afford \$150 per month. It will take the taxpayer over 60 months to pay the full balance, but the debt will be paid prior to the expiration of the CSED. The CIS also shows that Taxpayer A has no assets except his home, which has a fair market value (FMV) of \$350,000 and a first mortgage of \$347,000. Thus, there is no equity in the home. The taxpayer has requested a non-streamlined installment agreement to fully pay the tax debt; although Taxpayer A owes less than \$25,000, the liability will not be paid within 60 months.

In general, you should advocate for the non-filing of the NFTL as this taxpayer has been compliant in the past, the account will be paid prior to the expiration of the CSED, and the harm to the taxpayer would outweigh the benefit to the government because the taxpayer has no equity to which the lien could attach.

Example 2

You have been assigned the case of Taxpayer B. The facts are the same as in example 1 above, but the taxpayer has equity of \$200,000 in the house, *i.e.*, sufficient equity against which to borrow. However, the taxpayer does not want to liquidate or borrow against the house and has requested a non-streamlined IA to fully pay the liability; although Taxpayer B owes less than \$25,000, the agreement will not be paid within 60 months.

In these circumstances, the government's interests may outweigh the harm to the taxpayer who refuses to borrow against the property to pay the tax liability. Thus, you conclude based upon an evaluation of all of the facts and circumstances that you cannot recommend that the IRS refrain from filing an NFTL. You will prepare an OAR requesting that the OD make the lien filing determination. The taxpayer will have a right to a CDP hearing if the IRS files the NFTL.

Example 3

The facts are the same as in example 2, but the taxpayer has a special-needs child and must utilize the equity in the house to provide for ongoing medical and other care for the child. In these circumstances, you should advocate that the IRS refrain from filing an NFTL.

Example 4

Taxpayer C, who is self-employed, owns an insurance business with an unpaid combined income and employment tax liability of \$62,500 for tax years 2008 and 2009. The taxpayer filed Form 911 stating that he just received a notice and demand for payment of the outstanding tax liabilities and is worried about the IRS filing an NFTL. The taxpayer's financial information shows a substantial decline in gross receipts and an increase in unpaid accounts receivable. The taxpayer has requested that the IRS accept an offer in compromise. If the IRS files the NFTL, the taxpayer will lose his employment because the state insurance licensing board requires insurance agents to have a clean credit history. You determine the OIC is acceptable according to the IRM guidelines. You also determine that the NFTL will not be in the best interests of the taxpayer and the United States because it will hamper collection and future tax compliance if the taxpayer cannot retain his employment.

In these circumstances, you should advocate that the IRS accept the OIC and that the IRS refrain from filing an NFTL. The filing of the NFTL will hamper collection, prevent the taxpayer from maintaining employment and staying in business, and jeopardize the taxpayer's ability to comply with the tax laws in the future.

Sending an Operations Assistance Request (OAR)

If after weighing all facts and circumstances of your case, you have determined that TAS needs to advocate for the non-filing of an NFTL, elevate the case to your Local Taxpayer Advocate (LTA) and simultaneously forward the OAR to the Operating Division (OD) requesting that the IA, OIC, or CNC be accepted without filing an NFTL. In cases where you are accepting a non-streamlined installment agreement based on delegated authority,⁶ accept the IA and simultaneously forward the OAR requesting the non-filing of an NFTL. In all cases, the OAR should request an OD manager's review any determination denying TAS' recommendation not to file the NFTL. If the OD does not agree with your recommendation not to file the NFTL in any of these situations, immediately notify your LTA to discuss the case with the OD manager. If the OD manager disagrees with the non-filing of an NFTL, the LTA should promptly consider issuing a Taxpayer Assistance Order (TAO).

When sending an OAR, request **expedited handling**. Including the following language in the OAR will support your recommendation and clarify the issue: *Due to the above taxpayer's financial situation, we are recommending [insert - the account be placed into CNC status / the offer in compromise be accepted / acceptance of the IA]. Due to the amount of the liability, a Lien Determination is required.*

Based on a thorough review of the taxpayer's information (including IRS and available third party information) concerning their assets, income, and the value of the equity in the assets [insert specific facts and circumstances regarding the taxpayer], TAS has concluded that [insert all that applies: the NFTL will not attach to property / the NFTL will hamper collection / the harm to the taxpayer will outweigh the benefit to the government/ or the NFTL filing will jeopardize the taxpayer's ability to comply with the tax laws in the future]. Therefore, we are recommending that the IRS refrain from filing an NFTL so long as the taxpayer remains compliant.

*If you do not agree with this recommendation, please have **your manager** immediately contact the **Local Taxpayer Advocate** (Insert name and phone #) to discuss further.*

In cases where after considering the relevant factors, TAS decides not to recommend that the OD refrain from the filing of the NFTL, forward the OAR to the OD to request that the OD make the lien filing determination.

⁶ Per Delegation Order 13-2 (Rev. 1), TAS has the authority to accept installment agreements under the procedures contained in IRM 5.19.1.5.4 (or successor provisions).

Issuing a Taxpayer Assistance Order (TAO)

If the OD does not agree to refrain from filing the NFTL, evaluate the reasons given in support of filing the NFTL. If you still disagree, elevate the case to the LTA to consider issuing a TAO.⁷ If the LTA decides to issue a TAO, follow the procedures in IRM 13.1.20, *TAS Taxpayer Assistance Order Process*. The TAO should order the IRS to refrain from filing the NFTL and must explain why, based on the law and the facts of the case, the filing is not appropriate.

When preparing the TAO, you should include the following language, where appropriate:

Based on a thorough review of the taxpayer's information (including IRS and available third party information), the criteria for not filing a lien found in IRM 5.12.2.4.2 have been met. [Discuss how the various criteria listed in this IRM have been established in this case.] Therefore, the NFTL should not be filed so long as the taxpayer remains compliant.

Please contact James Book, Technical Analysis and Guidance, at (816) 291-9944, for further information.

⁷ The LTA may also consider pursuing an appeal under CAP. See IRM 5.19.4.5.2(12)(b) which provides that "if a taxpayer expresses serious objections regarding the lien filing . . . treat it as a Collection Appeal Program (CAP) before filing the lien."